Supreme Court, U.S.
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No. 02-964

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

The question presented in the State's petition for certiorari is whether "a state prisoner 'alert[s]' the State's highest court that he is raising a federal claim when—in that court—he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis[.]" (Petition i). The Ninth Circuit held that Reese "fairly presented" his federal claim of ineffective assistance of appellate counsel to the Oregon Supreme Court because that court had the "opportunity" to discover that Reese was raising a federal claim. (Petition, App-18). Although he did not support his claim of ineffective assistance of appellate counsel made to the state Supreme Court with any citation of federal authority or otherwise make it clear that he was raising a federal claim at all, the Ninth Circuit nevertheless held that the state court could have discerned that a federal claim had been raised by reading the decision of the state post-conviction trial court. (Petition, App-16 to App-19).

In the State's view, the Ninth Circuit thus transformed the "fair presentation" requirement, which demands that a litigant "fairly present" his federal claim to the State's highest court, into one that puts the onus instead on the state court to pursue any "fair opportunity" it may have to uncover a federal claim in the record made below. The State's position is that to "fairly present" a federal claim to a state court a petitioner must either cite the federal constitution or decisions expressly based on federal law, or otherwise make it clear that his claim is based on federal law.

In response to the State's petition, Reese has filed a brief in opposition that struggles mightily to avoid the question presented and to obfuscate the issues raised. None of Reese's "reasons for denying the petition" should prove persuasive.

Reese first contends that the Ninth Circuit's decision rests on its interpretation of State appellate procedure and that

"[t]his Court should deny review, because the [Ninth Circuit's] interpretation of Oregon appellate procedure will only involve matters of Oregon law." (Brief in Opposition 13). Reese is incorrect. The answer to the question presented in the State's petition does not depend on any issue of the State's appellate procedure, and those procedures are not relevant to the question presented. The pivotal procedural facts are few and they are clear. Reese raised a federally-based claim of ineffective assistance of appellate counsel before the state post-conviction trial court and that court decided the federal issue. Before the state Supreme Court, however, Reese raised no such claim. He did not cite the federal constitution or any decision based on that constitution. He did not in any fashion make it clear that he was raising a federal claim of ineffective assistance of counsel. That claim could be found only by reviewing the record made below in the state post-conviction proceedings and discovering the federal issue in the post-conviction trial court's decision.[1]

Reese's next two reasons for denying the State's petition depend on his assertion that the Ninth Circuit, "[i]n this and all of its fair presentation decisions, has strictly adhered to the requirements of *Duncan v. Henry* and *O'Sullivan v. Boerckel*." (Brief in Opposition 10).[2] The State admits that the Ninth Circuit's decision in this case pays lip service to this Court's "fair presentation" jurisprudence. Much of the court's description of the applicable law is accurate.

But what the court did, and what it ultimately said, are at odds with this Court's case law. Although the Ninth Circuit recited the applicable legal standards, what it did was to turn the "fair presentation" requirement, where it is the petitioner who must "fairly present" his claims to the state's highest

[1] Or at least that is where the Ninth Circuit believed the state Supreme Court should have found it. (Petition, App-17).

[2] *Duncan v. Henry*, 513 U.S. 364 (1995); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

court, into a "fair opportunity" requirement that is imposed on the state court and that demands that it "hunt[] for truffles buried in" the state court records. (Petition, App-20). The Ninth Circuit concluded that:

> Comity requires only that we not rule if the state court has not had the opportunity first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state forgoes.

(Petition, App-18). The state Supreme Court had that opportunity, the court determined, because it could have read the state post-conviction trial court's decision and because, even if it did not, that would not matter. In that event, "the court [would have] chosen not to take advantage of an opportunity provided [by the existence of the lower court's decision][.]" Therefore, the court concluded that "the interests of comity are no longer at issue." (Petition, App-19).

That approach and the court's analysis cannot be squared with this Court's "fair presentation" case law. And that the lower court accurately described and purported to apply that case law, while ultimately straying far from it, underscores the point made in the State's petition that, for the most part, the circuit courts of appeal have failed "to heed *Duncan*'s admonition that state prisoners wishing to raise federal claims in state court must 'say so.'" (Petition 16).[3]

[3] In arguing that the Ninth Circuit "strictly adheres" to this Court's "fair presentation" decisions, Reese relies heavily on that court's subsequent *en banc* decision in *Peterson v. Lampert*, 319 F.3d 1153 (9th Cir. 2003). (Brief in Opposition 22-26). Of course, that the Ninth Circuit may have gotten one case right hardly demonstrates that this decision is correct. And, although the court's decision in *Peterson* attempts to reconcile that case with this one, 319 F.3d at 1157, in fact the two decisions appear to be at odds with each other. In *Peterson*, the court held that the petitioner was required affirmatively to fairly present his federal claim to the state Supreme Court and that he had failed to do so. But Peterson had expressly relied on the federal constitution in his brief filed

Reese also contends that this Court should not grant the State's petition because "[t]here are other legal grounds for affirmance that demonstrate the decision below is correct regardless of how the Court resolves the question presented." (Brief in Opposition 10). Reese refers to the issue of whether the State's *Balfour* procedure[4]—which is used when appointed appellate counsel determines that there are no non-frivolous issues that can be raised on appeal—is constitutionally adequate. (Brief in Opposition 27-28). That issue would play no role in this Court's review, however. The Ninth Circuit did not decide the issue, concluding that it had no "occasion to rule on the constitutionality of the *Balfour* system" and determining only that Reese had "exhausted his claim of ineffective assistance of appellate counsel." (Petition, App-8 n. 6). Thus, the "fair presentation" issue is the only issue that is before this Court. If this Court were to affirm the Ninth Circuit on that issue, then the proper disposition would be the one reached by that court, that is, a remand for further proceedings on the merits of Reese's claim of ineffective assistance of appellate counsel. (Petition, App-19).

Reese's next reason for denying the State's petition is based on the allegation that the question presented here, and the issue of procedural default, "was never raised in the district court and was, therefore, waived by the state." (Brief in Opposition 29). That assertion is false. In its reply memorandum filed in the district court in response to Reese's

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with the state Court of Appeals, although he did not do so in his petition filed with the state Supreme Court. 319 F.3d at 1155. If *Reese* is correct, if "fair opportunity" is enough, and if it is sufficient that somewhere in the record the federal constitution was invoked, it is difficult to understand why Peterson was found not to have fairly presented his federal claim. Thus, the two decisions appear to be in conflict, a fact that again advances the State's point that the circuit courts of appeal do not consistently and faithfully apply this Court's "fair presentation" case law.

[4] *State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991).

amended petition and memorandum, the State specifically argued that Reese had procedurally defaulted his ineffective assistance of appellate counsel claims because he had not "fairly presented" them to the state courts, including the state Supreme Court.[5]

CONCLUSION

As the State noted in its petition, "[t]his case presents the Court with the opportunity to provide circuit courts with badly needed clarification of the meaning of 'fairly presented' in federal habeas litigation and, in doing so, to bring consistency to federal circuits' efforts to resolve exhaustion/procedural default questions." (Petition 11). Although Reese strives to blur the issues and attempts to lead the Court away from them, the case squarely presents the question posed in the State's petition. The State respectfully requests that this Court grant the petition and proceed to consider the significant issue presented, which continues to plague and divide the circuit courts.

Respectfully submitted,

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[5] An excerpt from the State's memorandum is appended.

APPENDIX

EXCERPT FROM REPLY MEMORANDUM IN RESPONSE TO PETITIONER'S AMENDED PETITION AND MEMORANDUM, AND OBJECTIONS TO PETITIONER'S EXHIBITS

Regarding the first claim of error alleged in his appellate brief, petitioner specifically mentioned that "[t]he trial court erred when it once again viciously disregarded the Court of Appeals' decision and sentenced defendant with prejudice, and *without regard to Oregon law and statutes*." Resp. Ex. 11 at 5 (emphasis added). Regarding the fifth claim of error alleged in his appellate brief, petitioner again relied exclusively on state law to argue that the trial court erroneously imposed a departure sentence based on his then existing criminal history and the seriousness of his offense (Resp. Ex. 11 at 9-10). The Fifth Amendment to the U.S. Constitution was never cited or relied upon to support either of these claims as required by *Duncan* and the doctrine of exhaustion.

Furthermore, whether an Oregon state trial court properly followed directions from the Oregon Court of Appeals is state law issue. Similarly, whether a state court properly imposed a departure sentence under the state sentencing guidelines is also question of state law. Therefore, neither of these claims are cognizable in a federal habeas proceeding because 28 U.S.C. § 2254(a) allows federal courts to entertain applications for writs of habeas corpus by state prisoners "only on the ground that the is in custody in violation of the Constitution or laws or treaties of the United States." *Id. See also Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) ("[i]t is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of [federal] constitutional dimension." 464 U.S. at 83 (*citing Engle v Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)).

Petitioner also argues that if his vindictive sentencing claim is defaulted, the default should be excused due to the ineffective representation rendered by counsel. However, ineffective counsel claims do not establish cause unless they were first properly raised as independent claims in state court, which petitioner again failed to do. *Supra*, section B. 2.

4. Ineffective Assistance of Appellate Counsel Claim is Defaulted

In ground four of his amended petition, petitioner alleges that appellate counsel performed ineffectively by failing to raise two meritorious issues, failing to withdraw, and failing to exhaust petitioner's state remedies by refusing to file a petition for review in the Oregon Supreme Court. Petitioner also argues that these claims are not defaulted because they were litigated in his PCR trial (Pet. Memo. At 21-23). This is incorrect. First, these claims were not properly alleged in petitioner's PCR petition and were therefore not actually litigated. *Supra*, section B. 2, note 6. Regarding this issue, petitioner's PCR petition generally alleged that appellate counsel "failed to raise issues that had been preserved for appeal." Resp. Ex. 114 at 5. In response to this general claim, the state simply argued that "[p]etitioner cannot state what colorable issues appellate counsel failed to raise on appeal that reasonable counsel would have raised and which would have achieved a favorable outcome." Resp. Ex. 116 at 25-26. Neither side litigated what specific claims should have been raised by appellate counsel.

Secondly, even if the Court finds that petitioner's appellate counsel claims were litigated during petitioner's PCR trial, they were nevertheless not "fairly presented" to the Oregon appellate courts. In his PCR appeal, petitioner generally stated that appellate counsel was ineffective for failing to raise issues on appeal (Resp. Ex. 125 at 5). However, petitioner failed to make even a passing reference to the

federal constitution or any other body of federal law. The Oregon appellate courts therefore were not alerted to any federal claims raised by petitioner as required by *Duncan* and the doctrine of exhaustion. *Supra*, section B.2. Moreover, their merits would not be considered. *Supra*, section B.2. Relief on these claims should accordingly be denied.[1]

[1] Unlike the petitioner in *Delgado v. Lewis*, 1999 WL 415523 (9th Cir. June 23, 1999), who specifically alleged ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), petitioner in this case failed to refer to any body of federal law at all to alert the Oregon courts to alleged violations of federal law.